

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**



75-7056

IN THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff-Appellee,

v.

SAMUEL H. SLOAN, individually and d/b/a
SAMUEL H. SLOAN & COMPANY

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of New York

ANSWERING BRIEF OF THE SECURITIES
AND EXCHANGE COMMISSION, APPELLEE

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COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Section 15(c)(2) of the Securities Exchange Act of 1934, provides that the Securities and Exchange Commission shall define, and prescribe means reasonably designed to prevent, fraudulent, deceptive or manipulative acts and practices by broker-dealers: Was the Commission authorized, pursuant to that provision, to promulgate Rule 15c2-11, a rule that requires broker-dealers who submit for publication price quotations for certain infrequently traded securities (a) to be in possession of specified current financial and other information with respect to those securities, (b) to submit such information to the quotations media prior to publication, and (c) to maintain certain records with respect to the circumstances surrounding such transactions?

2. Is there an unreasonable search and seizure within the meaning of the Fourth Amendment to the Constitution where a mandatory injunction requires a broker-dealer in securities to permit inspection of his books and records by representatives of the Commission in an easily accessible place?

3. Did the district judge properly grant the Commission's motion for a preliminary injunction where the factual allegations of the Commission's complaint with respect to the defendant's violations and likelihood of future violations of the federal securities laws were uncontroverted -- either by affidavit, through cross-examination of the Commission's affiant or by direct testimony of the defendant given at an evidentiary hearing?

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order of the district judge, Honorable Robert J. Ward, dated January 17, 1975, preliminarily enjoining the defendant Samuel H. Sloan, doing business as Samuel H. Sloan & Company, from further violations of certain of the record-keeping and anti-manipulative provisions of the federal securities laws. ^{1/}

^{1/} Appellant appears to complain that the order entered is improper because on its face it does not specify that it is a "preliminary" injunction (Appellant's Brief, p. 59) (hereinafter "Br. ____"). But the order was entered on the Commission's motion for preliminary injunction and the record is clear that Judge Ward did not purport to enter anything other than a preliminary injunction. When the order in question was handed to Judge Ward at the hearing he signed it and stated:

"I have just signed the preliminary injunction. I direct counsel to hand a copy thereof to Mr. Sloan

(footnote cont'd)

The preliminary injunction enjoined Mr. Sloan from violations of Section 15(c)(2) of the Securities Exchange Act, 15 U.S.C. 78o(c)(2) and Rule 15c2-11 promulgated thereunder, 17 C.F.R. 240.15c2-11. In specific terms, the district court restrained Mr. Sloan from "initiating over-the-counter quotations . . . while and at a time [he] failed to possess, maintain, preserve or make reasonably available upon request to any person expressing an interest in a proposed transaction in the security being quoted, and/or member of the plaintiff Commission's staff those items of information required to be in the possession of a broker-dealer before a broker-dealer may lawfully publish any such quotation . . ." (App. 38).

The district judge's order also contained a mandatory provision requiring Mr. Sloan "to permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. (or any other broker or dealer registered with the Commission of which Samuel H. Sloan may become a principal or controlling person) as required by Section 17(a) of the [Securities] Exchange Act, 15 U.S.C. 78q(a) and Rule 17a-4 promulgated thereunder." Further, Mr. Sloan was ordered "not to remove, destroy or alter the books and records of Samuel H. Sloan and Samuel H. Sloan & Company required to be made, maintained and preserved

(footnote cont'd)

and since the Clerk's Office is closed, I direct the Clerk to file this preliminary injunction on Monday." (Appendix to Briefs, p. 175) (hereinafter, App. ____).

pursuant to Section 17(a) of the Exchange Act, 15 U.S.C. 78q(a) and Rules 17a-3 and 17a-4 promulgated thereunder, 17 C.F.R. 240.17a-3 and 17a-4" (App. 37-38).

Insofar as the Commission sought mandatory relief requiring Mr. Sloan to give representatives of the Commission access to his books and records, this was an outgrowth of an earlier enforcement proceeding against Mr. Sloan. In that earlier action Mr. Sloan had been permanently enjoined by Judge Ward from further violations of Section 17(a) of the Securities Exchange Act, 15 U.S.C. §78q(a) and Rules 17a-3 and 17a-4 thereunder, 17 C.F.R. 240.17a-3 and 17a-4, based upon findings that he had failed properly to maintain, keep current and preserve certain of his books and records as required by those rules. Securities and Exchange Commission v. Samuel H. Sloan, Samuel H. Sloan & Co., 319 F. Supp. 996, 1001 (S.D. N.Y., 1974).^{2/} By that earlier judgment, Judge Ward had also permanently enjoined Mr. Sloan from further violating Section 15(c)(3) of the Securities Exchange Act, 15 U.S.C. §78o(c)(3) and Rule 15c3-1 thereunder, by effecting transactions as a broker-dealer in securities while not in compliance with the Commission's net capital requirements. As will be readily apparent, without access to the books and records of Mr. Sloan and Sloan & Co., as the preliminary injunction presently

^{2/} The permanent injunction issued in the earlier case is presently on appeal to this Court, No. 74-1436.

The violations underlying that permanent injunction also gave rise to an administrative proceeding before the Commission which, on April 28, 1975, resulted in an order revoking the broker-dealer registration of Sloan & Co. and barring Mr. Sloan from association with any broker-dealer. Mr. Sloan has petitioned this Court for review of that order Samuel H. Sloan v. Securities and Exchange Commission, No. 75-4087.

under review requires, the Commission's staff would be unable to insure compliance with that earlier permanent injunction.

It is undisputed that on November 6, 1974, Mr. Sloan wrote to the Commission's New York Regional Office advising that Office of his intention to resume activities as a broker-dealer in over-the-counter securities and stating that he would not permit any officer or employee of the Commission to inspect his books and records absent the production of a search warrant (App. 54; Br. 39). In view of Mr. Sloan's stated intention to deny the Commission access to his books and records and in view of the permanent injunction outstanding against him with respect to the maintenance of books and records, Mr. Sloan was notified both by letter and by telephone that on December 26, 1974, members of the Commission's staff would visit him for the purpose of conducting an examination of the books and records of the firm (App. 19, 23). On December 26, 1974, Thomas F. Dolan and Ira B. Spindler of the Commission's New York Regional Office visited Mr. Sloan at the address at which he purported to do business. Mr. Sloan refused to permit an inspection of his books and records advising the Commission officials that his books and records were easily accessible to himself but not to the Commission (App. 20, 25). ^{3/}

^{3/} At this juncture, the Commission's staff was faced with two alternatives: (1) it could have sought an adjudication of civil contempt with respect to the earlier permanent injunction, asserting that the right of access to Mr. Sloan's books and records was implicit in that injunction's requirement that Mr. Sloan maintain records in compliance with the Commission's rules; or (2) it could seek a separate mandatory injunction specifically requiring that the Commission be given access. The latter more conservative approach was adopted, giving Mr. Sloan the benefit of the doubt.

Violations of Rule 15c2-11

On December 18, 1974, the National Quotation Bureau ("the NQB"), publishers of the National Daily Quotations Service ("the pink sheets"), forwarded to the Commission's New York Regional Office applications submitted to that organization by Mr. Sloan to enter quotations for the shares of Franklin New York Corporation and Triex International Corporation. Trading in these issues previously had been suspended by the

(footnote cont'd)

Despite the fact that the preliminary injunction now before this Court has been outstanding since January 17, 1975, as of this writing, the Commission has still not obtained access to Mr. Sloan's books and records. After entry of the preliminary injunction, he sought a stay before this Court which was denied on February 13. Subsequently, members of the Commission's staff again sought access to Mr. Sloan's books and records without success. Accordingly, on March 24, 1975, the Commission moved the district court for an order adjudging the appellant to be in civil contempt of Judge Ward's preliminary injunction. On July 22, 1975, Judge Ward filed a memorandum opinion in which it was found that the defendant had wilfully violated the order requiring Mr. Sloan to permit an inspection by representatives of the Commission of his books and records. Mr. Sloan moved for re-argument which motion was denied. On September 3, 1975, Judge Ward entered an order giving Mr. Sloan twenty more days in which to purge himself of the civil contempt by permitting inspection. Failing that, Sloan was ordered to appear before Judge Ward on September 26, 1975, for sentencing. In the interim, Mr. Sloan sought a stay of the civil contempt order before this Court. Despite the fact that this Court, in Mr. Sloan's presence, denied the stay on September 26, 1975, Mr. Sloan failed to appear before Judge Ward on the afternoon of that day as ordered. The district judge, therefore, authorized the Commission's counsel to present a certified copy of the civil contempt order to the United States Marshall who would then be directed to arrest Mr. Sloan and confine him until he should permit inspection of his books and records.

Predictably, Mr. Sloan sought relief before the Supreme Court of the United States by making application to Mr. Justice Marshall for a stay of the civil contempt. Mr. Justice Marshall declined to grant that relief on October 3, 1975. So far as we are aware, the United States Marshall has not yet apprehended Mr. Sloan.

Commission and no current financial information was publicly available at that time (App. 23-24). Mr. Sloan submitted no financial or other information with respect to these issuers with his application to enter quotations, as required by Rule 15c2-11, and, as a result, the submission of such quotations appeared to be violative of the rule (App. 24).^{4/} Accordingly, a member of the Commission's staff telephoned Mr. Sloan on December 18, 1974, to advise him of the potential violation. Mr. Sloan stated that it was his intention to violate Rule 15c2-11 with regard to these quotations and further that he intended to submit quotations with respect to numerous other securities for which no current financial information was available. (App. 24, 124-125).

Consistent with his expressed intention to violate Rule 15c2-11, within the next week, Mr. Sloan submitted applications to the N.Q.B. respecting prices for stock in approximately 300 additional companies. These were forwarded to the Commission's New York Regional Office. Mr. Sloan indicated on these forms that he relied upon none of the available exemptions from the provisions of Rule 15c2-11 and, accordingly, the rule required that he supply to N.Q.B. certain financial and other information. He failed to file any such information with respect to any of these companies. Moreover, although a broker-dealer is required to maintain records of the circumstances

^{4/} As explained in Securities Exchange Act Release No. 9310, Rule 15c2-11, subject to certain exceptions, prohibits a broker-dealer from submitting any quotation for any security to any quotation medium unless he "has in his records specified information, which he must make reasonably available to any person expressing an interest in entering into a transaction in that security with him, and which he has no reasonable basis for believing is not true and correct" Of particular significance here, "The rule also requires the broker or dealer to send to the inter-dealer quotation system, at least two days before the submission or publication of the quotation, the specified information in a form prescribed by such system." (App. 40).

The full text of Rule 15c2-11 is appended hereto.

surrounding quotations which are within the ambit of Rule 15c2-11, Mr. Sloan's refusal on December 26, 1974, to permit members of the Commission's staff access to his books prevented them from determining whether or not he was in compliance with the rule in this respect (App. 25).

Proceedings in the District Court

On December 30, 1975, the Commission filed its complaint in this action and applied to Judge Ward for an order (1) temporarily restraining Mr. Sloan from submitting quotations in violation of Rule 15c2-11 and, (2) requiring Mr. Sloan to permit an immediate inspection of his books and records. That application was heard by Judge Ward in chambers in Mr. Sloan's presence. The temporary restraining order was granted. Judge Ward also ordered Mr. Sloan to show cause, on January 8, 1975, why the Commission's motion for preliminary injunction should not be granted. ^{5/} On that date the Commission's motion was adjourned until January 17, 1975, and the temporary restraining order extended until then. The extension order was signed by Judge Griesa, in Judge Ward's absence.

^{5/} In the course of this hearing in chambers, Mr. Sloan requested that Judge Ward recuse himself on the ground that Judge Ward had displayed bias and prejudice toward Mr. Sloan in the Commission's prior injunctive action against him. Judge Ward indicated that he would take the matter up with the Southern District's assignment committee. (App. 80-82).

Subsequently, on January 8, 1975, Mr. Sloan filed a writ of mandamus in this Court requesting that Judge Ward be directed to vacate his temporary restraining order and remove himself from the case. The petition for writ of mandamus was denied on January 16, 1975.

On January 17, 1975, the Commission's motion for preliminary injunction came on for hearing before Judge Ward. Upon submission of affidavits and oral argument by the Commission's counsel the Commission rested (App. 98). ^{6/}

Mr. Sloan had submitted no controverting affidavits or opposition papers. While the district judge noted that the defendant had had sufficient time in which to prepare opposition papers, he offered to extend his temporary restraining order and to permit Mr. Sloan additional time in which to prepare controverting affidavits or other responsive papers (App. 109). This offer was declined by Mr. Sloan (App. 110).

While Mr. Sloan had not attempted to controvert the affidavits of Thomas Dolan and Ira B. Spindler submitted by the Commission in support of its motion for preliminary injunction, he complained at the hearing that "there has been no opportunity to cross-examine an affidavit and, therefore, there is nothing before this Court, and I haven't conceded anything." (App. 120). Accordingly, while Mr. Sloan had not subpoenaed them, the two Commission affiants, who were present in the courtroom, were made available for cross-

^{6/} At this stage of the proceeding, Mr. Sloan formally moved the district judge to recuse himself, (App. 100) which motion was denied (App. 106). Mr. Sloan also moved that the case be decided by a three judge court, pursuant to 28 U.S.C. 2282 and 2284, on the ground that as an affirmative defense he would seek to enjoin enforcement of the Commission's rules (App. 197). He also moved to dismiss the proceeding (App. 108). The motions were denied in all respects (App. 118-119).

examination (App. 30). Mr. Spindler was called and cross-examined by Sloan; Mr. Dolan, at Mr. Sloan's election, was not called. (App. 147). ^{7/}

Having permitted Mr. Sloan to call and cross-examine the Commission's staff member who had submitted his affidavit in support of the motion for preliminary injunction, the district court then presented Mr. Sloan with an opportunity to present his own side of the case shielded from cross-examination by the Commission's counsel:

THE COURT: I would suggest gentlemen, that we do this. I think Mr. Sloan is entitled to open this application for a preliminary injunction. I would propose that Mr. Sloan take the stand, testify and tell his story and not be subjected to cross-examination. I am prepared to hear him as he wishes to tell his story in the same manner as if he submitted an affidavit in opposition to your motion and since an affidavit cannot be cross-examined, I would suggest at this juncture that I would not have cross-examination from you of him. If that is agreeable, fine . . ." (App. 147).

Counsel for the Commission agreed (App. 147).

In his testimony, Mr. Sloan attacked the constitutionality of the statutes and rules requiring broker-dealers to maintain certain books and records, but he did not deny that he had refused representatives of the Commission access to his books and records (App. 151-153). While Mr. Sloan expanded at some length on his theories with respect to the Commission's

^{7/} Mr. Sloan also sought to call Jerome Selvers, one of the Commission's trial counsel, to testify. Mr. Selvers had submitted an affidavit in support of the Commission's application for a ten-day extension of Judge Ward's temporary restraining order, which had been granted on January 8, 1975. Judge Ward declined to permit Mr. Sloan to call trial counsel to the stand but expressly stated that Mr. Selvers' affidavit would not be considered in determining the motion for preliminary injunction (App. 146).

motives in enforcing Rule 15c2-11 (App. 154-157) and attacked that rule as "vague" (App. 157) and unconstitutional (App. 154, 159), he did not deny having submitted quotations, as alleged in the Commission's Complaint, affidavits and testimony presented at the hearing. Indeed, he admitted having done so (App. 156-157, 161-162, 167).

At the close of Mr. Sloan's testimony, Judge Ward again offered to extend his temporary restraining order and to give Mr. Sloan additional time in which to present papers in opposition. Again, Mr. Sloan declined (App. 172). Accordingly, the district judge rendered his decision from the bench (App. 172-174). Based upon the Commission's moving papers, affidavits, the testimony of Ira B. Spindler and the testimony of Mr. Sloan "who did not contest the factual allegations presented by the Commission" (App. 173), the district judge found that unless restrained, the defendant would "continue to engage in acts and practices which constitute violations of Section [15(c)(2)] and [17(a)] of the Securities Exchange Act of 1934 as amended . . . and Rules 15c2-11 and 17a-4 promulgated thereunder . . ." (App. 173). ^{8/} The Commission's counsel handed up a proposed order of injunction which Judge Ward signed (See n 1, p. 2, supra). The order was then served upon Mr. Sloan in open court. (App. 175-176). Mr. Sloan appeals from that order here.

^{8/} Mr. Sloan moved the district court for a stay of the preliminary injunction pending appeal. His motion was denied (App. 176).

Mr. Sloan suggested that the district judge had not found that the mails or instrumentalities of interstate commerce had been used. To this the court responded:

"To the extent it is not included by implication, I expressly incorporate into my decision a finding that you used the facilities of interstate commerce and the telephones to conduct your business." (App. 176-177).

ARGUMENT

I. APPELLANT'S CHALLENGES TO THE STATUTORY BASIS FOR AND CONSTITUTIONALITY OF THE PROVISIONS PURSUANT TO WHICH HE HAS BEEN PRELIMINARILY ENJOINED ARE WITHOUT MERIT. 9/

A. The Promulgation of Rule 15c2-11 Was Within the Commission's Authority Pursuant to the Securities Exchange Act.

In his brief, at page 64, Mr. Sloan asserts that "Congress never authorized the promulgation of a rule such as Rule 15c2-11." But, on the same page, Mr. Sloan cites legislative history of the Securities Acts Amendments of 1975, which makes it clear that Congress is familiar with the terms of Rule 15c2-11 and satisfied with its present application:

"... Rule 15c2-11, adopted pursuant to Section 15(c)(2) of the Exchange Act, prohibits brokers and dealers from initiating market-making activities when certain financial and other information about a security and its issuer are not available." S. Rep. No. 94-75, 94th Cong., 1st Sess., p. 48 (1975).

The Senate Report went on to say that the Committee expected that the Commission would exempt municipal securities from the operation of that Rule. It would seem reasonable to assume that if the continued application of Rule 15c2-11 were contrary to the will of Congress, that body would not concern itself with prospective exemptions from the rule's operation.

9/ In addition to attacking the specific provisions and rules involved in this case, the Appellant also challenges the constitutionality of "the existence [sic] of an independant [sic] regulatory agency such as the S.E.C." This argument has already been considered by this Court in Samuel H. Sloan v. Securities and Exchange Commission, No. 74-2457, and rejected as frivolous, October 15, 1975.

When this action was commenced, Section 15(c)(2) of the Securities Exchange Act provided:

"No broker or dealer shall make use of the mails or of any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation. The Commission shall, for the purpose of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are deceptive or manipulative and such quotations as are fictitious." ^{10/}

Rule 15c2-11 was adopted, in the Commission's discretion, in response to the Congressional mandate that the Commission, by rules and regulations, "define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious." ^{11/} (Emphasis added). In promulgating the Rule, the

^{10/} By the Securities Acts Amendments of 1975, Public Law 94-29, the provisions of Section 15(c)(2) have been made applicable, as well, to transactions in municipal securities, theretofore an exempted security. The statutory provision was not otherwise altered.

^{11/} That Congress may delegate such rule-making authority to administrative bodies is not subject to serious dispute. In American Power and Light Co. v. Securities and Exchange Commission, 329 U.S. 90, 105 (1946), the Supreme Court stated:

"The legislative process would frequently bog down if Congress were constitutionally required to appraise beforehand the myriad situations to which it wishes a particular policy to be applied and to formulate specific rules for each situation. Necessity therefore fixes a point beyond which it is unreasonable and impracticable to compel Congress to prescribe detailed rules; it then becomes constitutionally sufficient if Congress clearly delineates the general policy, the public agency which is to apply it, and the boundaries of its delegated authority."

Commission specifically took notice of the potential for manipulation in connection with the distribution of shell corporations, where little or no financial information was available to either the brokers and dealers submitting the quotations or to public investors induced to purchase the securities, and in connection with market-making activities in "any infrequently-traded security in the absence of certain information." Securities Exchange Act Release No. 9310, September 13, 1975.^{12/}

Because of the potential for manipulation and deception in a marketplace operating without benefit of current financial and other information with respect to issuers of securities the Commission defined, as a "manipulative" or "deceptive" practice, the initiation of quotations by broker-dealers for securities subject to the rule unless such broker-dealers should be in possession of certain current information with respect to the issuer involved. As a "means reasonably designed to prevent" the practice the Commission prescribed that the broker-dealer be required to submit the specified information to the quotation system at least two days prior to publication. Securities Exchange Act Release 9310 (App. 40).

^{12/} While Mr. Sloan attacks the Rule for vagueness (Br. 63-64), the rule delineates the "infrequently traded" securities within its coverage with mathematical precision. Thus, the rule exempts from its provisions the submission or publication of quotations respecting securities admitted to trading on a national securities exchange which are traded on such an exchange on the same day or on the day before the day of submission or publication. The rule also exempts securities which have been the subject of both bid and ask quotations at specific prices at least twelve days within the previous thirty calendar days with no more than four business days in succession without such a quotation. Securities Exchange Act Release No. 9310 (App. 40).

... appears to be the appellant's contention (Br. 65) that the Commission may define as "fraudulent," "deceptive" or "manipulative" only such acts and practices as would be fraudulent in the common law sense. But, as this Court has recognized in another context, in proscribing conduct as fraudulent or manipulative it is not necessary that the prohibited conduct be of the kind undertaken with an intent to defraud. See, Jaffee & Company v. Securities and Exchange Commission, 446 F.2d 387, 391 (C.A. 2, 1971). There, in sustaining the Commission's suspension of a broker for violations of the Commission's Rule 10b-6, 17 C.F.R. 240.10b-6, this Court held that

"... the Commission need not have shown that Jaffee actually intended to defraud the market-place through his purchases. The rule proscribes and clearly defines a practice which had, prior to the adoption of the rule in 1955, been used fraudulently to distort the over-the-counter market. Where the rule applies, its prohibition is absolute." (Id., p. 391)(original emphasis).

While Rule 10b-6, like Rule 15c2-11, defines certain conduct as "manipulative" or "deceptive",^{13/} it is not, in terms, limited to deliberate frauds. In adopting Rule 15c2-11, as in promulgating Rule 10b-6, the Commission acted to control practices which had previously been used fraudulently to distort the over-the-counter markets. Securities Exchange Act Release No. 9310 (App. 40). This exercise of the Commission's rule-making authority was clearly within the purport of Section 15(c)(2) of the Act.

^{13/} In general, Rule 10b-6 provides that it shall constitute a "manipulative" or "deceptive" device for underwriters, issuers or certain others involved in a distribution of securities to bid for or purchase any security which is the subject of the distribution until after completion of their participation in the distribution.

B. The District Judge's Order Requiring
Appellant to Permit Access To his Books
and Records in an Easily Accessible Place
Occasions no Unlawful Search or Seizure.

The Commission has no interest in searching the premises at which Mr. Sloan purports to do business, nor has Judge Ward in his temporary restraining order or preliminary injunction directed that such a search be permitted by Mr. Sloan. ^{14/} The district court's order mandates only that the appellant "permit immediate examination in an easily accessible place by examiners and other representatives of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. . . ." (App. 37).

In sustaining a similar mandatory injunction requiring that a registered investment adviser produce his books and records for inspection by the Commission's staff, this Court held that such records "assume the characteristic of quasi-public documents and their disclosure may be compelled without violating the Fourth Amendment." Securities and Exchange Commission v.

^{14/} Accordingly, Mr. Sloan's reliance upon See v. City of Seattle, 387 U.S. 541 (1967), is misplaced. It was there held that a search warrant would be required for physical entry for inspection of private commercial premises. The preliminary injunction in the instant case mandates only the inspection of certain books and records in an easily accessible place.

Distinguishing See v. Seattle, *supra*, in another context, this Court has previously noted this distinction between physical entry onto private premises and the requirement that records be produced for inspection. Securities and Exchange Commission v. Brigadoon Scotch Dist. Co., 480 F.2d 1047, 1054 (C.A. 2, 1973) (enforcement of administrative subpoena).

Olsen, 354 F.2d 166, 170 (C.A. 2, 1965). In response to an attack upon the injunction in Olsen for over-breadth, this Court stated that "where all the records pertain to the investment business and are clearly relevant to the Commission's regulatory task in the securities industry the order is not, in the absence of any other circumstances, unreasonable. Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1946)." Id., p. 170. ^{15/}

^{15/} While the subheading of Mr. Sloan's argument attacking that portion of the preliminary injunction requiring him to give the Commission access to books and records suggests a Fifth Amendment argument (Br. 68), he does not appear to address that question directly. (Br. 68-71). Nor has he directly asserted the privilege against self-incrimination in refusing to permit inspection either before or after the entry of Judge Ward's orders.

In any event, Mr. Sloan could not successfully evade the record-keeping requirement imposed upon him by such a Fifth Amendment assertion. Upholding a preliminary injunction which required a defendant to submit to the Commission a complete record of all securities owned by him and thereafter to report quarterly all of his securities transactions, this Court said:

"It is clear that securities regulation is an 'essentially noncriminal and regulatory area of inquiry' The reporting provision here challenged requires disclosure of Stein's beneficial and record ownership of securities. Such ownership is generally a completely 'lawful activity' . . . and disclosure of such ownership is not an admission of an 'inherently suspect' activity We, therefore, conclude that the reporting provision of the preliminary injunction is proper in the circumstances of this case and that interposition of a Fifth Amendment claim, if appropriate, would be of no aid to appellant Stein."

Securities and Exchange Commission v. Radio Hill Mines Co., Ltd., 479 F.2d 4, 7 (C.A. 2), certiorari denied, 410 U.S. 941 (1973), citing California v. Byers, 402 U.S. 424, 431 (1971).

II. THE DISTRICT COURT'S TEMPORARY RESTRAINING ORDER AND ORDER OF PRELIMINARY INJUNCTION WERE PROPERLY ENTERED.

A. The District Court's Order Temporarily Restraining the Appellant Is Not Appealable and, in any event, was a Proper Exercise of Its Discretion.

A district court's temporary restraining order issued pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, as distinguished from a preliminary injunction entered pursuant to Rule 65(a), is not appealable. Morning Telegraph v. Powers, 450 F.2d 97, 99 (C.A. 2, 1971); Securities and Exchange Commission v. Charles Plohn & Co., 433 F.2d 376, 378 (C.A. 2, 1970); Pan American World Airways, Inc. v. Flight Engineers National Association, 306 F.2d 840, 841 (C.A. 2, 1962).^{16/} Accordingly, Mr. Sloan's complaints with respect to the entry of a temporary restraining order in this case are not properly before this Court.

^{16/} In his brief, pp. 35-36, Mr. Sloan cites nine cases for the proposition that temporary restraining orders may be appealable where there has been an abuse of discretion. But eight of these nine cases involved interlocutory injunctions analogous to the preliminary injunction provided for in F.R.C.P. Rule 65(a) and, hence, are inapplicable where a Rule 65(b) temporary restraining order of limited duration is involved. The remaining case involved a state court's ex parte prior restraint of speech in violation of the First Amendment. Carroll v. Princess Anne, Md., 393 U.S. 175 (1968). The extraordinary character of the circumstances presented there was recognized by the Supreme Court which said:

"There is a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." Id. p. 180.

Even if Mr. Sloan could show an interest which rises to the dignity of protected speech, this case would lend him no support, since he was given notice and did participate in the hearing in which Judge Ward granted the Commission's application for a temporary restraining order.

But even if retrospective appellate review of Judge Ward's temporary restraining order of limited duration were appropriate, it is difficult to imagine circumstances better suited to the use of that remedy than these. Mr. Sloan was given notice,^{17/} and was heard in opposition to the application before Judge Ward in a discussion which took place in chambers and was reported (App. 49-90). At that conference in chambers, Judge Ward observed that he had received a copy of a letter from Mr. Sloan to the Commission announcing his intention to operate as a broker-dealer while denying the Commission access to his books and records (App. 54). In response, Mr. Sloan flippantly noted that his books were in an "easily accessible place" but that they were easily accessible to himself and not to the Commission (App. 61). In responding to the Commission's affidavit with respect to violations of Rule 15c2-11, Mr. Sloan admitted entering

(footnote cont'd)

In his brief, at the bottom of p. 36, Mr. Sloan cites four cases which, in his opinion, establish the burden which must be met by a plaintiff seeking a temporary restraining order. Not one of those cases involved a temporary restraining order.

^{17/} "A temporary restraining order may be granted without written or oral notice to the adverse party . . . if (1) it clearly appears from specific facts shown by affidavit . . . that immediate and irreparable injury, loss, or damage will result to the applicant" Rule 65(b), Federal Rules of Civil Procedure.

the quotations as alleged in that affidavit and proclaimed that he was "performing a public service because [he was] submitting applications for listing in the pink sheets of approximately 300 securities which [had] not been traded for quite some time in most cases." (App. 77-78).

As Rule 65(b) provides, on January 8, 1975, the ten-day temporary restraining order was "for good cause shown" ^{18/} "extended for a like period" by Judge Griesa in Judge Ward's absence from New York (App. 30-31).

B. The Documentary Record and the Hearing Before Judge Ward Provide a More than Adequate Basis for the entry of a Preliminary Injunction.

As is fully described, supra, pp. 8-10, Mr. Sloan, who submitted no controverting affidavits or other papers in opposition to the Commission's motion for a preliminary injunction, was given extraordinary latitude by the district judge to present his case when that motion came on for hearing on January 17, 1975. Mr. Sloan was permitted to cross-examine the Commission official upon whose affidavit the Commission principally relied in seeking injunctive relief (App. 119-143). Moreover, at Judge Ward's suggestion, the Commission agreed not to cross-examine Mr. Sloan if he should desire to testify in his own behalf; and he did so testify without cross-examination. (App. 150-171).

^{18/} "Good cause" for the extension was shown by an affidavit submitted by a member of the Commission's staff, which stated that the Commission, after further efforts, had still been unable to inspect Mr. Sloan's books and that someone representing Sloan & Co. had attempted to enter quotations in the pink sheets in violation of Rule 15c2-11 during the pendency of the temporary restraining order. (App. 32-35).

At no time did Mr. Sloan dispute the factual allegations made by the Commission. ^{19/} Accordingly, the district court could quite properly have entered its order of preliminary injunction even in the absence of the hearing which was accorded Mr. Sloan. Guardians Assn. of the New York City Police Dept. v. Civil Service Commission of the City of New York, 490 F.2d 400, 403 (C.A. 2, 1973). Securities and Exchange Commission v. Frank, 388 F.2d 486, 490, 491 (C.A. 2, 1968). Securities and Exchange Commission v. Boren, 283 F.2d 312, 313 (C.A. 2, 1960).

Plainly, on this undisputed record, the district court properly concluded that Mr. Sloan would, unless restrained, continue to engage in acts and practices which constitute violations of the federal securities laws. In the light of this finding there is no question that the entry of the preliminary injunction was justified. Securities and Exchange Commission v. Shapiro, 494 F.2d 1301, 1308 (C.A. 2, 1974); Securities and Exchange Commission v. Manor Nursing Centers, Inc., 458 F.2d 1082, 1100 (C.A. 2, 1972); Securities and Exchange Commission v. Culpepper, 270 F.2d 241, 249-250 (C.A. 2, 1959). ^{20/}

^{19/} Notably, Mr. Sloan declined an offer of Judge Ward to grant additional time in which to attempt to controvert the Commission's allegations conditioned upon an extension of the temporary restraining order (App. 172).

^{20/} The preliminary injunction entered was set forth with sufficient particularity to satisfy the requirements to Rule 65 as well as to put Mr. Sloan upon notice of what was affirmatively required of him and as to what conduct was proscribed:

- (1) He was "Ordered to permit immediate examination in an easily accessible place by examiners . . . of the Commission of the books and records of Samuel H. Sloan and Samuel H. Sloan & Co. . . ." (App. 37);

(footnote cont'd)

C. The District Judge's Findings of Fact Comply with Rule 52(a) of the Federal Rules of Civil Procedure.

In entering the preliminary injunction under review, Judge Ward complied fully with Rule 52(a) of the Federal Rules of Civil Procedure, ^{21/} the purpose of which "is satisfied if the trial courts' findings are sufficient to afford a clear understanding of the ground upon which the court based

(footnote cont'd)

- (2) He was "Ordered not to remove, destroy or alter the books and records . . ." (App. 37);
- (3) He was enjoined from initiating over-the-counter quotations "while and at a time [he] failed to possess, maintain, preserve, or make reasonably available upon request to any person expressing an interest in a proposed transaction in the security being quoted, and/or members of the Commission's staff those items of information required to be in the possession of a broker-dealer before a broker-dealer may lawfully publish any such quotation as required by Rule 17 C.F.R. 240. 15c2-11 (a)(4) and (c)." (App. 38).

The Order is thus plainly sufficient to stand on its own contents. In any event a copy of Rule 15c2-11 was annexed to the injunction served upon Mr. Sloan (App. 175-176; 39-45).

21/ Rule 52(a) of the Federal Rules of Civil Procedure provides in pertinent part:

"In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specifically and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the ground of its action"

its judgment." Fluor Corporation v. United States, ex rel. Mosher Steel Co., 405 F.2d 823, 828 (C.A. 9), certiorari denied, 394 U.S. 1014 (1969). Accord, Mahramas v. American Export Istrandtsen Lines, Inc., 475 F.2d 165, 168 (C.A. 2, 1973).

While the appellant makes much of the supposed absence of fact finding, as we have noted (p. 21, supra), he raised no factual dispute before the district court. ^{22/} Judge Ward took specific notice of the fact that Mr. Sloan, in his testimony, had not contested the factual allegations presented by the Commission in the affidavits of Messrs. Spindler and Dolan. As Judge Ward expressly stated, "Mr. Sloan's only defense is that the foregoing statutes and regulations are unconstitutional." (App. 174). Thus, "although the findings are brief, they fully state the basis of the court's

^{22/} At the close of the January 17, 1975, hearing, Mr. Sloan complained that the court had not found that the mails or instrumentalities of interstate commerce had been used in connection with the violations found (App. 176). Judge Ward responded:

"To the extent it is not included by implication, I expressly incorporate into my decision a finding that you used the facilities of interstate commerce and the telephone to conduct your business." (App. 177).

In any event, this Court has expressly held that submission of quotations to the pink sheets, a publication distributed in interstate commerce, is sufficient to invoke the Commission's statutory jurisdiction. Securities and Exchange Commission v. Jaffee, supra, 446 F.2d at 392.

decision and are adequate compliance with Rule 52(a)" Mahramas v. American Export Isbrandtsen Lines, Inc., supra, 475 F.2d at 168. Indeed, in another instance where the decision of a district court to enter an injunction was attacked only on constitutional grounds, so that no issues of fact existed, this Court sustained the injunction without any Rule 52(a) findings of fact whatever. Douds v. Local 1250, Retail Wholesale Dept. Store Union, 170 F.2d 695, 699 (C.A. 2, 1948).

The ground upon which the district judge entered his preliminary injunction was his finding that, unless restrained, Mr. Sloan would continue to violate the Commission's record-keeping provisions and its rule with respect to the initiation of over-the-counter quotations by broker-dealers (App. 173). As basis for that finding Judge Ward expressly credited the testimony of Ira B. Spindler (given in response Mr. Sloan's cross-examination) that Mr. Sloan had stated his intention wilfully to commit violations (App. 173).

Fact findings pursuant to Rule 52(a) may be made orally as part of an opinion from the bench, as the district judge has done in this case, so long as they are adequate to set forth the basis of the district court's disposition of the case. Amplex of Maryland, Inc. v. Outboard Marine Corporation, 380 F.2d 112, 113 (C.A. 4, 1967); Kridler v. Highland Insurance Company, 372 F.2d 945, 946 (C.A. 5, 1967); Boutte v. M/V Malay Maru, 370 F.2d 906, 907-908 (C.A. 5, 1967).

In any event, even if the findings were found wanting under the Rule, the defect would be a non-jurisdictional one and reversal of the district court's judgment would not be required. Sampson v. Murray,

415 U.S. 61, 87 (1974); English v. Town of Huntington, 448 F.2d 319, 321 (C.A. 2, 1971); Douds v. Local 1250, Retail Wholesale Dept. Store Union, supra, 170 F.2d at 699; Rossiter v. Vogel, 148 F.2d 292, 293 (C.A. 2, 1945). In English, supra at 321, where a district judge's denial of a preliminary injunction was before this Court, Chief Judge Friendly stated that the Court of Appeals could affirm the district court's disposition of the case absent Rule 52(a) findings because the Court of Appeals "[could] discern enough solid facts from the record to enable [it] to render a decision." Accord, Sampson v. Murray, supra, 415 U.S. at 87. Similarly, here, even if Judge Ward had not spoken to the factors underlying his decision preliminarily to enjoin Mr. Sloan, the undisputed evidence in the record with respect to Mr. Sloan's intentional disregard of the federal securities laws fully meets the test of English v. Town of Huntington.

CONCLUSION

For the foregoing reasons, the district judge's orders should be
23/
affirmed.

Respectfully submitted,

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THOMAS L. TAYLOR III
Attorney

Dated: October, 1975

23/ The Commission does not address Mr. Sloan's argument that this action was improperly assigned to Judge Ward and that Judge Ward should have recused himself. The supposed mystery as to why this case was assigned to Judge Ward is resolved by Mr. Sloan himself at page 2 of his brief:

"This case is a sequel to a previous injunction action instituted by the Securities and Exchange Commission ("S.E.C.")."

Mr. Sloan's contention that Judge Ward should have recused himself is frivolous. As Judge Ward noted, Mr. Sloan did not even file an affidavit setting forth specific factual grounds showing bias, as required by 28 U.S.C. §144. On January 16, 1975, this Court denied Mr. Sloan's petition for a writ of mandamus seeking to require Judge Ward to recuse himself.

STATUTORY APPENDIX



Securities Exchange Act of 1934,
15 U.S.C. 78a, et seq.

Section 15(c)(2),*
15 U.S.C. 78o(c)(2)

No broker or dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any security (other than an exempted security or commercial paper, bankers' acceptances, or commercial bills) otherwise than on a national securities exchange of which it is a member, in connection with which such broker or dealer engages in any fraudulent, deceptive, or manipulative act or practice, or makes any fictitious quotation, and no municipal securities dealer shall make use of the mails or any means or instrumentality of interstate commerce to effect any transaction in, or to induce or attempt to induce the purchase or sale of, any municipal security in connection with which such municipal securities dealer engages in any fraudulent, deceptive, or manipulative act or practice or makes any fictitious quotation. The Commission shall, for the purposes of this paragraph, by rules and regulations define, and prescribe means reasonably designed to prevent, such acts and practices as are fraudulent, deceptive, or manipulative and such quotations as are fictitious.

*As amended by Securities Acts
Amendments of 1975, Public
Law 94-29.

§ 240.15c2-11 Initiation or resumption of quotations without specific information.

(a) It shall be a fraudulent, manipulative, and deceptive practice within the meaning of section 15(c)(2) of the Act, for a broker or dealer to publish any quotation for a security or, directly or indirectly, to submit any such quotation for publication, in any quotation medium (as defined in this section) unless:

(1) The issuer has filed a registration statement under the Securities Act of 1933 which became effective less than 90 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium: *Provided*, That such registration statement has not thereafter been the subject of a stop order which is still in effect when the quotation is published or submitted, and such broker or dealer has in his records a copy of the prospectus specified by section 10(a) of the Securities Act of 1933; or

(2) The issuer has filed a notification under Regulation A under the Securities Act of 1933 which became effective less than 40 calendar days prior to the day on which such broker or dealer publishes or submits the quotation to the quotation medium: *Provided*, That the offering circular provided for under Regulation A has not thereafter become the subject of a suspension order which is still in effect when the quotation is published or submitted, and such broker or dealer has in his records a copy of such offering circular; or

(3) (i) The issuer is required to file reports pursuant to section 13 or 15(d) of the Act, or is the issuer of a security covered by section 12(g)(2)(B) or (G) of the Act, and

(ii) The broker or dealer has a reasonable basis for believing that the issuer is current in filing the reports required to be filed at regular intervals pursuant to section 13 or 15(d) of the Act, or, in the case of insurance companies exempted from section 12(g) of the Act by section 12(g)(2)(G) thereof, the annual statement referred to in section 12(g)(2)(G) (i) of the Act; and

(iii) The broker or dealer has in his records the issuer's most recent annual report filed pursuant to section 13 or 15(d) of the Act, or the annual statement in the case of an insurance company not subject to section 12(g) of the Act, together with any other reports required to be filed at regular intervals under such provisions of the Act which have been filed by the issuer after such annual report or annual statement; or

(4) Such broker or dealer has in his records, and shall make reasonably available upon request to any person expressing an interest in a proposed transaction in the security with such broker or dealer, the following information (which shall be reasonably current in relation to the day the quotation is submitted), which he has no reasonable basis for believing is not true and correct or reasonably current, and which was obtained by him from sources which he has a reasonable basis for believing are reliable: (i) The exact name of the issuer and its predecessor (if any); (ii) the address of its principal executive officer; (iii) the state of incorporation, if it is a corporation; (iv) the exact title and class of the security; (v) the par or stated value of the security; (vi) the number of shares or total amount of the securities outstanding as of the end of the issuer's most recent fiscal year; (vii) the name and address of the transfer agent; (viii) the nature of the issuer's business; (ix) the nature of products or services offered; (x) the nature and extent of the issuer's facilities; (xi) the name of the chief executive officer and members of the board of directors; (xii) the issuer's most recent balance sheet and profit and loss and retained earnings statements; (xiii) similar financial information for such part of the 2 preceding fiscal years as the issuer or its predecessor has been in existence; (xiv) whether the broker or dealer or any associated person is affiliated, directly or indirectly with the issuer; (xv) whether the quotation is being published or submitted on behalf of any other broker or dealer, and, if so, the name of such broker or dealer; and (xvi) whether the quotation is being submitted or published directly or indirectly on behalf of the issuer, or any director, officer or any person, directly or indirectly the

Rule 15c2-11 (continued)

beneficial owner of more than 10 percent of the outstanding units or shares of any equity security of the issuer, and, if so, the name of such person, and the basis for any exemption under the federal securities laws for any sales of such securities on behalf of such person. If such information is made available to others upon request pursuant to this subparagraph, such delivery, unless otherwise represented, shall not constitute a representation by such broker or dealer that such information is true and correct, but shall constitute a representation by such broker or dealer that the information is reasonably current in relation to the day the quotation is submitted, that he has no reasonable basis for believing the information is not true and correct, and that the information was obtained from sources which he has a reasonable basis for believing are reliable.

(b) With respect to any security the quotation of which is within the provisions of this section, the broker or dealer submitting or publishing such quotation shall maintain in his records information regarding all circumstances involved in the submission or publication of such quotation, including the identity of the person or persons for whom the quotation is being submitted or published and any information regarding the transaction provided to the broker or dealer by such person or persons.

(c) The broker or dealer shall maintain in writing as part of his records the information described in paragraphs (a) and (b) of this section, and any other information (including adverse information) regarding the issuer which comes to his knowledge or possession before the publication or submission of the quotation, and preserve such records for the periods specified in § 240.17a-4.

(d) For any security of an issuer included in paragraph (a)(4) of this section, the broker or dealer submitting the quotation shall furnish to the interdealer quotation system (as defined in paragraph (e)(1) of this section), in such form as such system shall prescribe, at least 2 days before the quotation is published or submitted, the information regarding the security and the issuer which such broker or dealer is required to maintain pursuant to said paragraph (a)(4) of this section.

(e) For purposes of this section:

(1) "Quotation medium" shall mean any "interdealer quotation system" or any publication or electronic communications network or other device which is used by brokers or dealers to make known to others their interest in transactions in any security, including offers to buy or sell at a stated price or otherwise, or invitations of offers to buy or sell.

(2) "Interdealer quotation system" shall mean any system of general circulation to brokers or dealers which regularly disseminates quotations of identified brokers or dealers.

(3) Except as otherwise specified in this section, "quotation" shall mean any bid or offer at a specified price with respect to a security.

(f) The provisions of this section shall not apply to:

(1) The publication or submission of a quotation respecting a security admitted to trading on a national securities exchange and which is traded on such an exchange on the same day as, or on the business day next preceding, the day the quotation is published or submitted.

(2) The publication or submission of a quotation for securities of foreign issuers exempt from section 12(g) of the Act by reason of compliance with the provisions of § 240.12g3-2(b).

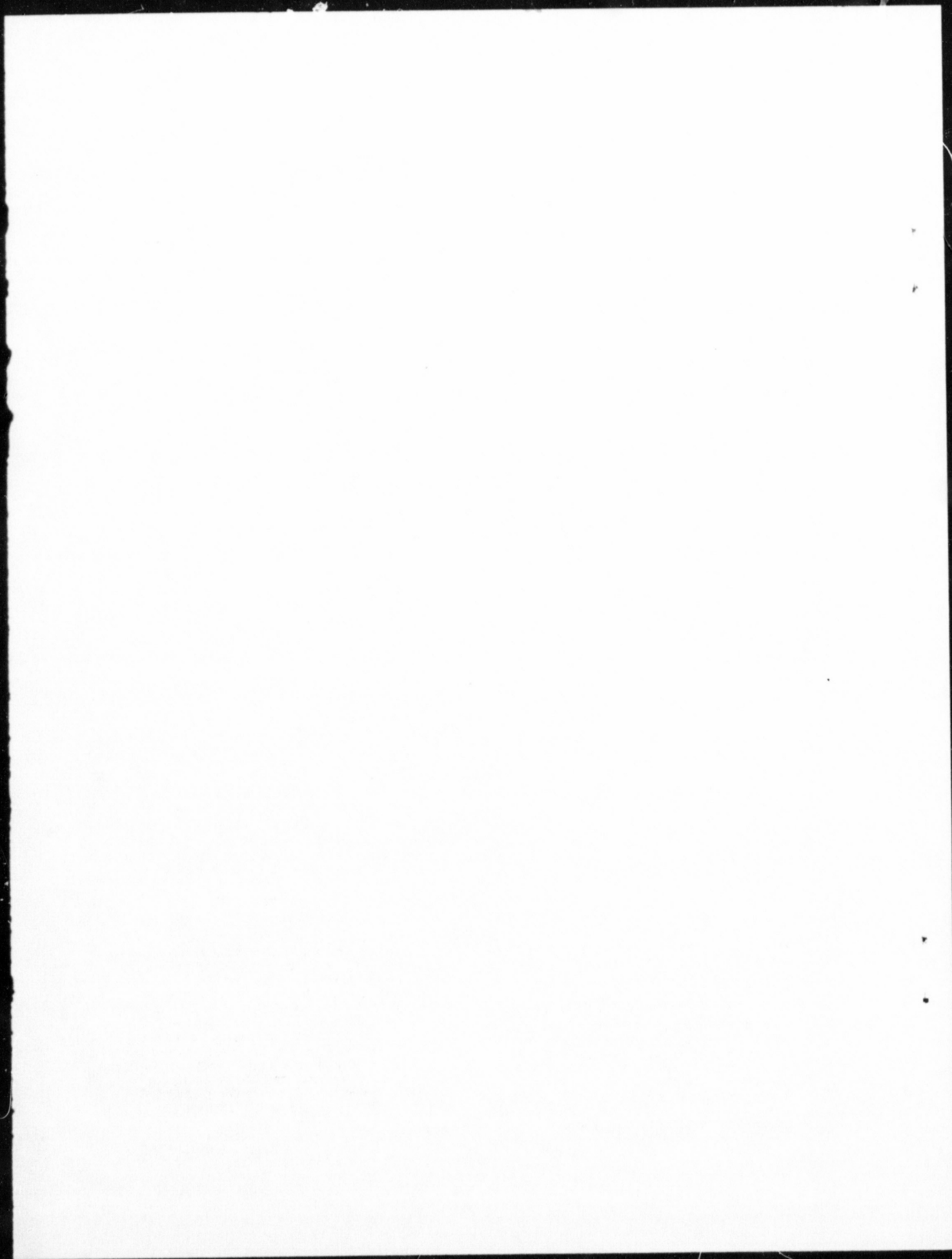
(3) The publication or submission of a quotation respecting a security which has been the subject of both bid and ask quotations in an inter-dealer quotation system at specified prices on each of at least 12 days within the previous 30 calendar days, with no more than 4 business days in succession without such a two-way quotation.

(g) The requirement in paragraph (a)(4) of this section that the information with respect to the issuer be "reasonably current" will be presumed to be satisfied, unless the broker or dealer has information to the contrary, if:

(1) The balance sheet is as of a date less than 16 months before the publication or submission of the quotation, the statements of profit and loss and retained earnings are for the 12 months preceding the date of such balance sheet, and if such balance sheet is not as of a date less than 6 months before the publication or submission of the quotation, it shall be accompanied by additional statements of profit and loss and retained earnings for the period from the date of such balance sheet to a date less than 6 months before the publication or submission of the quotation.

(2) Other information regarding the issuer specified in paragraph (a)(4) of this section is as of a date within 12 months prior to the publication or submission of the quotation.

(h) This section shall not prohibit any publication or submission of any quotation if the Commission, upon written request or upon its own motion, exempts such quotation either unconditionally or on specified terms and conditions, as not constituting a fraudulent, manipulative or deceptive practice comprehended within the purpose of this section.





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SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

October 23, 1975

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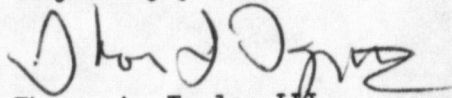
Re: Securities and Exchange Commission v. Samuel H. Sloan, individually
and d/b/a Samuel H. Sloan & Co., No. 75-7056.

Dear Mr. Fusaro:

Enclosed for filing are twenty-five copies of the Commission's
answering brief as appellee.

I certify that I have caused two copies of the Commission's brief
to be served by mail upon Samuel H. Sloan, 917 Old Trents Ferry Road,
Lynchburg, Virginia 24503.

Very truly yours,


Thomas L. Taylor III
Attorney

Enclosures